SUPREME COURT, U.S.
FILED
MAY 18 2007
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

JOSEPH JOHN RYAN,
Petitioner,

v.

ALBERTO R. GONZALES, as
Attorney General of the United States,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Godfrey Y. Muwonge
Counsel for Petitioner
P.O. Box 250787
Milwaukee WI 53225
(414) 467-7324

BACKGROUND

Ryan's plea got him convicted in Illinois on 9/29/95 of criminal sexual assault/family (minor 17). Ryan successfully completed 4 years probation and Illinois discharged him completely, only for the INS to start banishment proceedings. His post-conviction lawyer didn't call the victim who swears she would've withdrawn her allegations against Ryan post-conviction. The immigration judge knew the victim had written that in support of her father's § 212(c) waiver request, but pretermitted Ryan's 212(c) application based on *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005), notwithstanding this Court's rule that Ryan and others with pre-IIRIRA pleas remain entitled to § 212(c) relief because they gave government the benefit of convicting them by plea to avoid trial, expecting § 212 (c) relief. *See INS v. St. Cyr*, 533 U.S. 289 (2001). The Seventh Circuit says "too bad, *Blake* rules," even though *Blake's* "statutory counterpart" doctrine arises from the exclusion-deportation distinctions IIRIRA abolished.

QUESTIONS PRESENTED

1. Under *St. Cyr* and the BIA's own *Matter of Edwards*, 20 I. & N. Dec. 191 (BIA 1990), forbidding pretermitting if a relief application requires evidentiary hearing to answer whether rehabilitation has occurred

enough for the alien to merit a deportation waiver, is it error for the Seventh Circuit to cite *Velere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007), to deny Ryan's petition when *Valere* holds only that "sexual abuse of a minor," one definition of aggravated felony, has no statutory counterpart in the grounds of inadmissibility, a proposition different from Ryan's contention that the actual ground of removal is aggravated felony, not sexual abuse of a minor, and that ground is no bar to § 212(c) relief without a five-year prison sentence?

2. Under the Seventh Circuit's categorical approach to construction of state statutes for INA equivalents, is it error to deny Ryan's petition as the court below did by affirming the BIA's construction of 720 ILCS 5/12-13(a)(3) to constitute "sexual abuse of a minor" and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(A), even though neither the Immigration Judge, the BIA, nor the Seventh Circuit parsed the text of 720 ILCS 5/12-13(a)(3) to determine whether it categorically defines sexual abuse of a minor? That Illinois statute is divisible, proscribing conduct that can be sexual abuse of a minor and conduct that is not. It seems improbable that Congress intended that convictions conceivable under the statute, for instance, of a victim's siblings—slightly older; a twin with no age difference; or younger than the victim—to constitute the sexual abuse of a minor that defines aggravated felony as a ground for removal.

TABLE OF CONTENTS

BACKGROUND i

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 26

APPENDIX 27

TABLE OF AUTHORITIES

CASES

Addington v. Texas, 441 U.S. 418 (1979) 12
Bazan-Reyes v. Ashcroft, 256 F.3d 600 (7th Cir. 2001) ... 14
Francis v. INS, 536 F.3d 238 (2nd Cir. 1976) 17
Gattem v. Gonzales, 412 F.3d 758 (7th Cir. 2005) 14
INS v. St. Cyr, 533 U.S. 289 (2001) ..... passim
Lara-Ruiz v. INS, 241 F.3d 934 (7th Cir. 2001)..... 14
Magana-Pizano v. INS, 200 F.3d 603 (9th Cir. 1999) 15
Matter of Arias-Uribe, 13 I. & N. Dec. 696 (BIA 1971).... 19
Matter of Blake, 23 I. & N. Dec. 722 (BIA 2005) .... passim
Matter of Edwards, 20 I. & N. Dec. 191 (BIA 1990) ..... i, 9
Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991 (BIA 1999).....15
Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976) 17, 18, 19
Matter of Soriano, 21 I. & N. Dec. 516 (BIA 1996) 16
Reid v. INS, 949 F.2d 287 (9th Cir. 1991) 25
Reyes-Hernandez v. INS, 89 F.3d 490 (7th Cir. 1996)..... 23
Ryan v. Gonzales, No. 06-3135, 2007 U.S. App. LEXIS 9214, * (7th Cir. Apr. 20, 2007) (Unpublished) 1, 11
Valere v. Gonzales, 473 F.3d 757 (7th Cir. 2007)... ii, 18, 19, 20
Woodby v. INS, 385 U.S. 276 (1966) 12, 13, 15
Xiong v. INS, 173 F.3d 601 (7th Cir. 1999) 14

STATUTES

18 U.S.C. § 2242 (2004) 14
18 U.S.C. § 2243 (2004) 14
18 U.S.C. § 2246 (2004) 14
18 U.S.C. § 3509 (2004) 15
28 U.S.C. § 1254 (2004) 1
720 ILCS 5/12-12 (2006) 4, 14
720 ILCS 5/12-13 (2006) ..... passim
720 ILCS 5/12-16 (2006) 6
Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat 3009 (1996) ..... passim
Immigration and Nationality Act § 101; 8 U.S.C. § 1101 (2004) ii, 2, 7, 10, 14
INA § 212; 8 U.S.C. § 1182 (2004) ..... passim
INA § 212(c); 8 U.S.C. § 1182 (1994) ..... passim
INA § 235; 8 U.S.C. § 1225 (2004) 3
INA § 237; 8 U.S.C. § 1227 (2004) ..... passim
INA § 240; 8 U.S.C. § 1229a (2004) 3, 12, 24

REGULATIONS

8 C.F.R. § 1240.10 (2006) 11

OPINIONS BELOW

The Seventh Circuit's disposition *Ryan v. Gonzales*, No. 06-3135, 2007 U.S. App. LEXIS 9214, * (7th Cir. Apr. 20, 2007) is reproduced in the appendix at 1-4. The BIA's decision summarily affirming the immigration judge's decision and order is reproduced in the appendix at 5-6. The immigration judge's decision and order pretermitting Ryan's § 212(c) relief application and ordering that Ryan be removed to Ireland is reproduced in the appendix at 7-10.

JURISDICTION

The Seventh Circuit denied Ryan's petition for review on April 20, 2007. The 90th day after that date is July 20, 2007. Filing of this petition for writ of *certiorari* is well within that limit. The Court has jurisdiction under 28 U.S.C. § 1254(1) to entertain Ryan's petition for writ of *certiorari*.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1101(a)(43)(A)

The term "aggravated felony" means murder, rape, or sexual abuse of a minor.

---

8 U.S.C. § 1182(a)

See Appendix at 11 *et seq.*

---

8 U.S.C. § 1182(c)

"Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful un-relinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . ."

---

8 U.S.C. § 1225(a)(1)

"An alien present in the United States who has not been admitted, or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this Act an applicant for admission."

---

8 U.S.C. § 1227(a)(2)(A)(iii)

"Any alien who is convicted of an aggravated felony at any time after admission is deportable."

---

8 U.S.C. § 1229a(a)(2)

"An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 212(a) or any applicable ground of deportability under section 237(a)."

---

720 ILCS 5/12-12(f)

"'Sexual penetration' means any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration. Evidence of emission of semen is not required to prove sexual penetration."

---

720 ILCS 5/12-13(a)(3)

"The accused commits criminal sexual assault if he or she commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member..."

STATEMENT OF FACTS

Joseph John Ryan born in Ireland on June 20, 1951 will turn 56 in 2007. He was admitted at New York City on July 17, 1975, as a lawful permanent resident ("LPR") or immigrant and has lived most of his life in this country. Ryan's married to 53-year-old Mary (Clark) Ryan, his second wife. Together, they share a home in the Chicago suburb of Orland Heights. Ryan and his wife continue a close relationship with their four children and grandchild, and give all spiritual and financial support mainly from Ryan's employment.

Ryan has worked as a Dock Worker at Yellow Freight System, Inc., in Chicago Ridge since January 24, 1984 and for the past 23 years has been a regular on the 4:00 p.m.-to-midnight shift Monday through Friday. He's been a member of the Teamsters' Union Local 710 for 12 years and an active supporter and participant in ethnic athletic and cultural activities at Gaelic Park. Ryan has truly achieved the American dream.

However, Ryan's an alcoholic whose alcoholism resulted in substantial domestic problems. Based upon the charges Ryan's daughter Sharon, then 17 years old, made against Ryan, the Cook County prosecutor charged Ryan with violating 720 ILCS 5/12-13(a); (3);

and (4) (varying types of criminal sexual assault), and violating 720 ILCS 5/12-16(b); and (d) (aggravated criminal sexual abuse).

Ryan and the Cook County prosecutor bargained and agreed to a plea deal under which Ryan would plead to one count of violating criminal sexual assault under 720 ILCS 5/12-13(a)(3) in exchange for a four-year sentence to "special probation" and a condition that Ryan attend mandatory Alcoholics Anonymous ("AA") meetings in addition to one year of counseling or therapy, desist from direct contact with Sharon, and register with the State of Illinois as a sex offender.

Ryan entered his plea before the Circuit Court of Cook County, Illinois and was adjudged convicted by that court on September 29, 1995. He registered as a sex offender with the State of Illinois on December 28, 1995. On September 22, 1999, the Circuit Court for Cook County, Illinois terminated Ryan's special probation as satisfactorily completed.

On September 10, 2004, however, the Department of Homeland Security's (DHS) United States Immigration and Customs Enforcement ("ICE") bureau issued a Notice to Appear ("NTA") to commence removal proceedings against Ryan. The NTA charged that Ryan was subject to removal under §

237(a)(2)(iii) of the Immigration and Nationality Act ("INA"); 8 U.S.A. § 1227(a)(2)(iii), alleging that his conviction for violation of 720 ILCS 5/12-13(a)(3) constituted conviction of an aggravated felony as defined under INA § 101(a)(43)(A); 8 U.S.C. § 1101(a)(43)(A) ("sexual abuse of a minor").

The ICE detained Ryan and only released him on a cash bond contemplating Ryan's application for a waiver of deportation as a long-term LPR under former INA § 212(c); 8 U.S.C. § 1182(c). John D. Colbert of John D. Colbert & Associates appeared first with Ryan before the Immigration Judge. On whether Ryan was ready to plead to the allegations and charge in the NTA, Colbert demurred and intimated to the Immigration Judge that Ryan was seeking post-conviction relief as follows:

> "The complainant, his daughter, is willing to recant, her testimony and say that actually this never happened at all. Those repressed memory syndrome things were - - that's where we are at the moment...It's up for consideration on January 21. Now, obviously we are concerned too, because the *St. Cyr* case then we need to get this - - we got to do the 212(c). We've got to get it in before April..."

A.R. at 000055. Sharon provided two letters in support of her father's § 212(c) relief application and was a

witness Ryan intended to call to support his § 212(c) quest as his application indicated through Sharon's letters to which Ryan's opening brief makes reference. Petitioner's Brief at 8-9.

Sharon swears, in an affidavit to support her father's appeal in the state of Illinois courts of denial of his post-conviction motion, that she would have withdrawn the allegations she made against her father in the case in which her father pleaded to result in his conviction in 1995 and that if the case were remanded and she were called to testify, Sharon would voluntarily and willingly testify on her father's behalf and would withdraw her allegations she made of any prior wrongdoing on her father's part against her. *See* affidavit reproduced in appendix at 17-19.

REASONS FOR GRANTING THE PETITION

I. **The Court should grant certiorari because the Seventh Circuit failed to recognize the flaw in its rationale in affirming the BIA's "statutory counterpart" doctrine. That doctrine pitched on the distinction between inadmissibility and removability is flawed because the distinction relies on an illusory legal difference. There was a legal difference when exclusion and deportation proceedings were different because the grounds applied in each proceeding were distinctly different from the other. When IIRIRA consolidated**

exclusion and deportation to produce removal proceedings, Congress subjected all aliens to the same regime and Congress has authorized the Government to charge an alien in removal proceedings with any applicable ground on the deportability or inadmissibility sides. That makes the distinction *Blake* attempts one without a legal difference. *Blake* thus rescinds what *St. Cyr* held to be Ryan's and others' entitlement to a hearing on their § 212(c) applications in exchange for giving government the benefit of convictions by plea to avoid trial. *Blake* also usurps Congressional authority in creating a *de facto* rule mandating perfunctory construction of state and other criminal statues to determine their INA equivalents for purposes of removal. *Blake,* by implication, modifies the BIA's own *Matter of Edwards* ban on pretermitting relief applications when those applications answer whether the alien has rehabilitated sufficiently to merit relief. Based on *Blake* the Immigration Judge and the BIA, seconded by the Seventh Circuit, truncated Ryan's ability to show rehabilitation to qualify for § 212(c) relief. Ryan could have called his daughter in support of his § 212(c) application and Ryan's daughter Sharon would have testified that Ryan didn't sexually assault her, going both to the gravity or seriousness of Ryan's conduct for purposes of his § 212(c) application, which would have been mitigation evidence as to Ryan's conviction's gravity and, thus, significantly improving Ryan's shot at § 212(c) relief.

The Seventh Circuit essentially ignored Ryan's plea to its own sense of rule and order when Ryan pointed to the fact that neither the Immigration Judge nor the BIA had bothered to follow the Seventh Circuit's categorical approach in construing state statute in order to reach their INA equivalents for purposes of determining removability. In the Immigration Judge's zeal to close Ryan's case, that judge betrayed her prejudgment that Ryan had been convicted of an offense in Illinois that qualified as what Congress intended as the ground of removal with which Ryan was charged by the DHS in the NTA.

Clearly in error, but nonetheless telling, the Immigration Judge held, in relevant part, that the DHS had issued Ryan an NTA on September 10, 2004 in which the DHS charged Ryan with removability under INA § 237(a)(2)(A)(iii) as convicted of an aggravated felony defined in INA § 101(a)(43)(A) as "a law relating to criminal sexual abuse of a minor." A.R. at 000039. No such language exists under that section of the INA, and it is clearly the Immigration Judge's less-than-careful reading of the Illinois statute together with the INA that probably produced that hybrid.

That lapse of attention by the Immigration Judge goes to show the tenor and unfairness of Ryan's hearing, which the Seventh Circuit swept aside in minimizing the seriousness of the same Immigration Judge's accepting of a plea from Ryan's counsel to the allegations and charge of the NTA, to which counsel answered "We submit the allegations and concede removability," upon the

Immigration Judge's question "How does your client plead?" A.R. at 000060.

The Agency's own Regulation, which is binding on the Immigration Judge, uses *shall*, a signal which, when employed in statutes or regulations means an imperative, to indicate how the Immigration Judge should obtain pleadings from the alien to the allegations and charge of the NTA.

> "The immigration judge shall require the respondent to plead to the notice to appear by stating whether he or she admits or denies the factual allegations and his or her removability under the charges contained therein. If the respondent admits the factual allegations and admits his or her removability under the charges and the immigration judge is satisfied that no issues of law or fact remain, the immigration judge may determine that removability as charged has been established by the admissions of the respondent."

8 C.F.R. § 1240.10(c).

In its unpublished opinion disposing of Ryan's case, the Seventh Circuit casually holds that "[i]n the proceeding before the IJ, Ryan 'submitted and conceded removability,' R. 60 at ln. 4-5," *see Ryan*, 2007 U.S. pp. LEXIS 9214, at *2, as if those are standard terms the Seventh Circuit knows go along with removal proceedings. Nothing in the Agency's

Regulation provides proxies for *admit* and *deny,* and the Regulation does not even say anything about counsel pleading on the alien's behalf. The Regulation mandates that the Immigration Judge *shall* require the alien to plead to the notice to appear.

The Regulation provides no guidance either as to how the Immigration Judge may resolve contested questions of fact, but those questions of fact are not difficult to resolve in view of the burden of proof the Government must shoulder in order to procure a removal order. *See Woodby v. INS,* 385 U.S. 276 (1966) (Government must prove alien's deportability by evidence that is clear, unequivocal, and convincing); *accord* INA § 240(c)(3)(B); 8 U.S.C. § 1229a(c)(3)(B). This Court has, for instance, held that the word *unequivocal* by itself begs evidence that admits of no doubt, "a burden approximating, if not exceeding that used in criminal cases," *Addington v. Texas,* 441 U.S. 418, 432 (1979).

For the Seventh Circuit to casually treat Ryan's argument that he didn't properly plead and admit the NTA's allegations and charge is improper and ignores Ryan's statutory right of confrontation and putting the Government to its strictest proof on his deportability, which is well-established in *Woodby, supra.* But Ryan's lawyer, John D. Colbert, had also told the Immigration Judge at Ryan's first Master hearing that Ryan was contesting removability because his daughter Sharon was recanting her allegations against Ryan. A.R. at 000055.

In addition, the Immigration Judge had Sharon's written letters by the second Master hearing, in which Sharon affirmatively states that her father's conviction resulted from strife between the two and that Sharon does not believe her father should be deported. Those issues combined throw doubt on the factual underpinnings of the NTA and the Immigration Judge's holding that the Government shouldered its *Woodby* burden of proving Ryan's deportability.

The Immigration Judge could have gone a different route, by obeying the Seventh Circuit's categorical approach to construing state statutes for their INA equivalents. The Immigration Judge, as argued before, hastily jumped to the conclusion that Ryan's Illinois conviction constituted "criminal sexual abuse of a minor." A.R. at 000039. The Illinois statute, 720 ILCS 5/12-13(a)(3) is criminal sexual assault/family (minor under 18). Nothing in the statute's text suggests sexual abuse, at least on the face of that statute's text.

That text only requires an act of penetration when a victim is under 18 and the victim and the accused have a familial relationship. *See* 720 ILCS 5/12-13(a)(3). Sexual penetration can constitute any number of acts and means

> "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object

> into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration. Evidence of emission of semen is not required to prove sexual penetration."

720 ILCS 5/12-12(f).

Under statutory construction under the Seventh Circuit's categorical approach, Ryan's conviction cannot be construed a conviction for sexual abuse of a minor in the single step in which the Immigration Judge, the BIA, and the Seventh Circuit all assumed it to be. *See Bazan-Reyes v. Ashcroft*, 256 F.3d 600, 606 (7th Cir. 2001) (categorical approach determines whether Congress intended a term "to encompass conduct prohibited under...state statute...[by asking] only whether the generic elements of the [state] statute...constitute [conduct the term defines under federal law]."), *citing Lara-Ruiz v. INS*, 241 F.3d 934, 941 (7th Cir. 2001); *Xiong v. INS*, 173 F.3d 601, 605 (7th Cir. 1999).

The Seventh Circuit has itself found the BIA's jurisprudence to lack any clear guidance as to whether Illinois' criminal sexual assault is the same or equivalent to sexual abuse of a minor, the definition of aggravated felony in 8 U.S.C. § 1101(a)(43)(A), and the INA contains no definition of sexual abuse either, let alone sexual abuse of a minor, the BIA having rejected the 18 U.S.C. §§ 2242, 2243, and 2246 federal definitions of sexual abuse as too restrictive. *See Gattem v. Gonzales*, 412 F.3d 758, 768 (7th Cir. 2005) (Posner, J., *dissenting*) (criticizing BIA's vague

suggestion of 18 U.S.C. § 3509(a)(8) as the kind of definition near what the BIA would propose for a suitable definition for sexual abuse of a minor), *citing Matter of Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (BIA 1999).

In sum, the factual basis of the deportability charge in Ryan's case remains up in the air because the Immigration Judge prejudged whether Ryan had been convicted of an aggravated felony. The Immigration Judge assumed that the Illinois conviction on Ryan's record constituted criminal sexual abuse of a minor, and started from that wrong foot to deciding Ryan's deportability. Predictably, the Immigration Judge concluded that the Government had met its *Woodby* burden. But that holding is not supported by substantial evidence, contrary to the BIA's summary affirmance of the Immigration Judge's decision, and the Seventh Circuit's affirmance of the BIA's decision.

This Court has held that the principle of settled expectations requires that Ryan and others who gave government the benefit of convicting them and exacting punishment by plea, saving government the trouble and expense of trial, militates that Ryan and others should have the opportunity to apply for § 212(c) relief and have a hearing on their applications. *See St. Cyr*, 533 U.S. at 322, *citing Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) (it is well-documented that aliens consider immigration consequences of their pleas to criminal charges).

The Government tried its best in *St. Cyr* to save the *Matter of Soriano*, 21 I. & N. Dec. 516 (BIA 1996), *vac'd on other grounds* (AG 1997), case and this Court shot down all of the arguments the Government served up in its desperate attempt. *See, e.g., St. Cyr*, 533 U.S. at 297 (rejecting argument that AEDPA and IIRIRA withdrew the Attorney General's authority to adjudicate § 212(c) applications completely, and that there remained no forum within which to decide whether the Attorney General retained in such power).

Blake continues the Government's effort seen in *Soriano*, and is a continuation of the attempt to divest individuals like Ryan of the opportunity to which *St. Cyr* affirmatively holds Ryan and others in his position to be entitled for § 212(c) relief and to be heard on those applications for relief. *Blake's* "statutory counterpart" argument is crafty but still illusory as to its core. That is, the "statutory counterpart" doctrine has its foundation in a distinction which no longer exists and the doctrine has no legitimate purpose after IIRIRA.

When exclusion and deportation were functionally-different processes, statutory counterparts were essential on the deportation side because they bridged the gap between those aliens in deportation and others facing exclusion. That is, those facing were

facing exclusion—excluded from admission after having departed the U.S. to go overseas and were, thus, applying for permission to return to their un-relinquished domicile of 7 or more years. Those who'd stayed home—faced deportation and were not applying for admission such that they could be excluded from admission and were, thus, not eligible for § 212(c) relief denoted "application for permission to return to un-relinquished domicile of 7 or more years," which the Immigration and Naturalization Service ("INS") reserved for aliens in exclusion proceedings.

The Second Circuit correctly held that distinction between a class of similarly-situated aliens violated the 14th Amendment's Equal Protection clause because it bore no rational relationship to any legitimate purpose of the § 212(c) statute, in *Francis v. INS*, 536 F.3d 238. In *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976), the Board conceded and agreed to grant those LPRs who'd gone nowhere and were, therefore, returning from no temporary absence the same benefit by applying a legal fiction of sorts to § 212(c) application for permission to return to an un-relinquished domicile of 7 years or more.

In his concurrence filed almost a month after the majority opinion—the concurrence explains in its footnote 1 that the majority decision was inadvertently released on September 10, 1976, resulting in the

concurrence's October 5, date—in *Silva*, Board Member Irving A. Appleman reveals that the INS sent a memo agreeing to treat all LPRs similarly, leading the Solicitor General to decide not to seek *certiorari* in the Supreme Court in the *Francis* case of the Second Circuit. *See Silva*, 16 I. & N. Dec. at 32-33. Judge Appleman reveals another piece of the puzzle that's somewhat instructive. The BIA, the Seventh Circuit in its *Valere* opinion, and those circuits to which the Seventh Circuit points as authority for the proposition that the "statutory counterpart" doctrine is sound and well-settled, perhaps make too much of that doctrine because the § 212(c) statute itself was not an example of careful drafting, in the first instance.

> "Unquestionably, as the court pointed out in *Francis v. INS, supra*, in section 212(c) the Congress created, *perhaps inadvertently*, an avenue of relief under the statute for the [LPR] who took a temporary trip abroad...whereas the same alien could not get that relief if he remained here...a distinction, in the words of the court, not rationally related to any legitimate purpose of the statute.
>
> "At the same time, one cannot help but be puzzled by that portion of the *Francis* decision which lays the deficiency in the statute at the feet of the Board of Immigration Appeals. The

> fact is that if there had been no Board interpretations whatsoever, the lack of 'equal treatment,' noted in *Francis* would still have existed...The *Francis* opinion notes the 'facial' limitations of section 212(c) and agrees that the reading given the statute in *Arias-Uribe, supra,* was consistent with the language of section 212(c)."

Id. at 32 (emphasis added).

In effect, Judge Appleman said that the BIA's jurisprudence hadn't added to the statute, which belies *Valere's, Blake's* and other holdings that the "statutory counterpart doctrine" independent of the statute and a necessary addition to make the statute work. *See, e.g., Valere*, at *11-12. Moreover, *Matter of Arias-Uribe*, 13 I. & N. Dec. 696 (BIA 1971), contains nothing that yields to *Blake's* suggestion that Congress intended to keep creating discreet new offenses based upon which to bar § 212(c) relief, in what would in effect be a preemptive legislating feat.

That is, *Blake* relies on the premise of justifying barring aliens with offenses deemed sexual abuse of a minor—because those are not mentioned in the grounds of inadmissibility—on the theory that Congress intended to bar such aliens from § 212(c) relief. *See Blake, supra,* at 727. But that seems peculiar

because Congress introduced sexual abuse of a minor as a definition of aggravated felony much later than Congress enacted § 212(c) relief. By *Blake's* rationale, Congress now has a constitutional role of psychic in addition to its legislative role, but which the founders wrote nowhere in the Constitution's text.

True—as *Valere* and other cases point out that the Congress intended to apply new definitions IIRIRA introduced such as the "sexual abuse of a minor" definition of "aggravated felony" retroactively by the express imperative in the "before, on, or after" clause to which *Valere* and other cases cite. That's generally the rule, but like all rules it has an exception. New definitions apply to completed acts with respect to relief or penalties that continue to exist under the INA.

That's hardly the same thing as applying new definitions to § 212(c) relief that the Congress was expressly repealing in IIRIRA, in which Congress is supposed to have mandated retroactive ban of relief based upon the new definition of aggravated felony. Such makes little, if any, common sense and it tortures the legal mind.

Congress should not be presumed to have intended retroactive application of a definition to relief it was repealing. Congress should be presumed to have naturally assumed that the new definitions it was creating had no significance to the § 212(c) relief it was

repealing, because it was repealing that relief, meaning that it was putting the relief out of reach and would have had no reason to also be looking for new definitions to bar that relief. To conclude otherwise is to assume benefit of foreshadowing as a fixture of the legislative process, which makes legislating a psychic exercise.

In effect, the same rule of *St. Cyr* applying the presumption against implied retroactive effects of statutes must apply to the sexual abuse of a minor definition in that regard because there is no express statement from Congress that, notwithstanding repeal of § 212(c) relief, Congress intended that new definition to apply to that repealed relief. *See* 533 U.S. at 325-26.

Blake commits a *post hoc ergo propter hoc* fallacy by *Blake's* argument that because Congress introduced sexual abuse of a minor as a new definition of aggravated felony in IIRIRA but did not also add sexual abuse of a minor to the grounds of inadmissibility, Congress, therefore, must have intended to bar § 212(c) relief to those the INS or DHS would later charge with sexual abuse of a minor as a ground of removal.

Blake ignores the statute's mandate. The actual ground of removal the alien must be charged with is not the definition of aggravated felony—sexual abuse of

a minor. Sexual abuse of a minor is what the DHS alleges the Illinois state conviction to be as an INA equivalent and, thus, the definition of aggravated felony. It is aggravated felony that's the ground of removal, which Congress has mandated the DHS to charge the alien with as the ground of removal. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). But aggravated felony is not a bar to § 212(c) relief, itself. Aggravated felony requires a qualifier, for instance, a 5-year sentence of imprisonment, which the *St. Cyr* non-retroactivity formulation recognizes, to be a bar to 212(c) relief.

Just as the Seventh Circuit said 10 years ago, *Blake* is now another attempt at mouse-trapping aliens who've plea-bargained and given government a benefit they're under no obligation to give government, especially in light of their constitutional right to trial and other safeguards, an ignoble motive to ascribe to Congress with respect to § 212(c) or IIRIRA and AEDPA, which this Court has exhaustively analyzed in *St. Cyr* and settled very well in favor of Ryan and others like him.

> "Considering the fell consequences of deportation, especially in cases of exceptional hardship, which are precisely the cases in which an appeal to section 212(c) would have a chance of success, we think it unlikely that Congress intended to mousetrap aliens into conceding

> deportability by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability. No such ignoble intention appears in the statute. Its absence is determinative under *Landgraf* because to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal consequence to the concession, an event that occurred before the new law came into existence."

Reyes-Hernandez v. INS, 89 F.3d 490, 492-93 (7th Cir. 1996).

It's unfortunate that given the scarce resources our Government has, the Government keeps applying those resources to settled issues like those in *St. Cyr*. However, *Blake* raises issue with *St. Cyr* and requires this Court's intervention to clarify the issues raised. The Seventh Circuit and others have agreed that the "statutory counterpart" doctrine, notwithstanding abolition of the exclusion-deportation distinctions that gave it life, is, nevertheless, still a meaningful doctrine under the post-IIRIRA regime under which there is no legal difference between the class of aliens subject to any charge under INA § 237(a); 8 U.S.C. § 1227(a), the deportability statute, or INA § 212(a); 8 U.S.C. § 1182(a), the inadmissibility statute.

That position completely ignores that Congress mandates in INA § 240(a)(2); 8 U.S.C. § 1229a(a)(2) that any alien in removal proceedings, that's all aliens post-IIRIRA, may be charged with any applicable ground under either § 237(a) or § 212(a). It's also arguably an abuse of prosecutorial discretion to calculatingly charge someone like Ryan with a single ground of removal under § 237(a), and then argue that that ground of removal has no corresponding or "statutory counterpart" under § 212(a).

When Ryan was convicted in Illinois on September 29, 1995, his conviction would not have resulted in the charge of removal he faces now, let alone an aggravated felony defined as sexual abuse of a minor because that definition didn't exist at that time under the INA. The DHS, if at all, would have had to charge Ryan with a ground of deportation that would have had some counterpart in § 212(a), which would clearly have left Ryan eligible for § 212(c) relief. If *St. Cyr* means anything, it means that Ryan and others in his position should be put in the position in which they were when they bargained for the plea deals such as the one for which Ryan bargained in April, 1995, which resulted in his conviction on 9/29/1995.

Banishing Ryan after his 32-year sojourn in this country with an otherwise clean record and an infraction that seems at rock bottom to lie in alcoholic

illness seems farthest from what this nation was founded upon. Ryan's 53-year-old wife and his four children and grandchild all depend on Ryan in some way, but especially financially. To ignore such hardship can only be seen as driven by the naked desire to win, which is unfortunately not what Government counsel is charged to pursue, as such counsel is charged to pursue justice and upholding the Constitution. *See, e.g., Reid v. INS*, 949 F.2d 287, 288 (9th Cir. 1991). The case against Ryan lacks a sense of proportionality. It has the hallmarks of a setup from the DHS issuing its NTA dated 9/10/2004 and selectively charging a single ground of removal that ensured divesting Ryan of any shot, let alone a fair shot at § 212(c) relief.

Mouse-trapping gets no better than what obtains here, because Ryan relied on the existence of § 212(c) relief when he pleaded in April of 1995 to give the State of Illinois his conviction on 9/29/1995. The State of Illinois exacted punishment with which Ryan complied to the letter. We now know from his daughter's affidavit that the State of Illinois may very well have exacted punishment from Ryan without entitlement to it. Be that as it may, Ryan got the deal for which he bargained. But Ryan bargained for that deal clearly believing that the deal had as part of it his shot at § 212(c) relief.

Ryan didn't then know that the relief he thought obviated the risk of going to trial would dissipate 17 months later. When Cook County convicted Ryan on 9/29/95, nobody knew § 212(c) would be no more in exactly a year and a day.

IIRIRA became law on 9/30/1996, 17 months after Ryan entered his plea pursuant to the deal Ryan rightly believed contained 212(c) relief. If the tenets of our legal system are fairness and simple justice, the Odyssey through which the DHS has put Ryan has been nowhere near that system.

CONCLUSION

The Court should grant Ryan's petition for writ of *certiorari,* vacate the decision of the Seventh Circuit Court of Appeals, and remand this case for a full hearing on Ryan's § 212(c) relief application.

Respectfully submitted,

Date: 05/12/2007

Godfrey Y. Muwonge
Counsel for Petitioner
P.O. Box 250787
Milwaukee WI 53235
(414)467-7324

APPENDIX

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued March 27, 2007
Decided April 20, 2007

Before

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

No. 06-3135

JOSEPH JOHN RYAN,
Petitioner,
v.
ALBERTO R. GONZALES,
Respondent.

On Petition for Review of an order of the Board of Immigration Appeals.

No. A35-042-827

ORDER

Joseph John Ryan is a citizen of Ireland who entered into the United States in 1975 as an immigrant. He made a life for himself in the Chicagoland area where he is married and has four children. He has been employed as a dock worker since 1984 and is active in his union and community. However, Ryan was also convicted in 1995 of criminal sexual assault of a family member under the age of 18 in violation of 720 ILCS 5/12-13-a-3 and was sentenced to four years probation. In 2004, a Notice to Appear was issued charging him with removability pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) because the sexual assault conviction qualified as an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(A).

In the proceeding before the IJ, Ryan "submitted and conceded removability," R. 60 at ln. 4-5, but he submitted an application for a § 212(c) waiver. The IJ held that a § 212(c) waiver was not available because of the BIA's decision in *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005). The BIA affirmed the IJ's decision.

Ryan argues that *In re Blake* conflicts with the Supreme Court's decision in *I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001). However, we previously rejected this argument in *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007); *see also Dalombo Fontes v. Gonzales*,---F.3d---, No. 05-1755, 2007 U.S. App. LEXIS 7408, 2007 WL 949590, at *7 n.4 (1st Cir. Mar. 30, 2007); *Vo v. Gonzales*,---F.3d---, No. 05-60518, 2007 U.S. App. LEXIS 6393, 2007 WL 816522 (5th Cir. Mar. 19, 2007). *Valere* controls our consideration of this issue. We find no reason to contrast *Valere* or otherwise reject its application in the present case. Therefore, we faithfully apply *Valere* and reject Ryan's argument as to § 212(c) relief.

Ryan also raises secondary arguments in his brief as to the type of removal charges levied against him and whether he is actually removable. Unfortunately for Ryan, he did not bring these arguments before the IJ and BIA and therefore we cannot review them. *See Capric v. Ashcroft*, 355 F.3d 1075, 1087 (7th Cir. 2004) ("An alien is required to raise and exhaust his remedies as to each claim or ground for relief if he is to preserve the right to judicial review of that claim.") (*citing Abdulrahman v. Ashcroft*, 330 F.3d 587, 594-95 (3d Cir. 2003); *Mojsilovic v. I.N.S.*, 156 F.3d 743, 748 (7th Cir. 1998)).

The petition for review is DENIED.

PETITION FOR REVIEW DENIED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VA

File: A35 042 827 Date: July 6, 2006

In re: JOSEPH JOHN RYAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alexander C. Vrbanoff

ON BEHALF OF DHS: Joseph M. Young
Asst. Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge dated April 26, 2005.[1] We also find that the respondent had not established good cause to have his hearing continued on April 26, 2005.

---

[1] The Immigration Judge Omitted the full citation for *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005). We agree with the Immigration Judge that she is bound by *Matter of Blake, supra*, and 8 C.F.R. § 1212.3(f)(5).

See 8 C.F.R. § 1003.29. *See Matter of Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). We also note that the a victim who is under the age of 18 is a "minor" for purposes of determining whether an alien has been convicted of sexual abuse of a minor within the meaning of section 101(a)(43)(A) of the Immigration and Nationality Act. *See Matter of V-F-D-*, 23 I. & N. Dec. 859 (BIA 2006). Therefore, we find no basis to disturb the Immigration Judge's determination that the respondent failed to demonstrate eligibility for relief from removal. Accordingly, the appeal is dismissed.

/s/ Jeffrey L. Romig
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Chicago, Illinois

File No. : A 35 042 827 April 26, 2005

In the Matter of)
)
JOSEPH JOHN RYAN) IN REMOVAL PROCEEDINGS
)
Respondent)

Charge:

Applications:

On Behalf of Respondent: On Behalf of DHS:

Alexander C. Vrbanoff Kim Kucic
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Ireland who was admitted to the United States at New York City on July 17, 1975, as an immigrant. On September

29, 1995, however, he was convicted in the Circuit Court of Cook County, Illinois, for the offense of criminal sexual assault/family (minor 17 years old) in violation of ILCS 720 5/12-13-A-3. The respondent was sentenced to four years special probation as a result of this conviction. This resulted in the issuance of a Notice to Appear against the respondent dated September 10, 2004, charging him with removability under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as an alien convicted of an aggravated felony as defined in Section 101(a)(43)(A) of the Act, a law relating to criminal sexual abuse of a minor.

The Notice to Appear has been entered into the record as Exhibit No. 1, and the respondent, through his attorney, has admitted each of the factual allegations contained in the Notice to Appear and conceded removability as charged. This was done on April 26, 2005.

The respondent has also indicated that, if necessary, Ireland is the country that he wishes to return to. In support of the charges of removability that the respondent has admitted to already, the Government has submitted the copy of certification of conviction record from the Cook County Circuit Court, and this has been entered into the record as Group

Exhibit No. 2 without objection from counsel. Having received the pleadings of the respondent through his attorney and reviewing the conviction record (Exhibit No. 2), I find that removability has been established by clear and convincing evidence as required by the Act.

In lieu of removal, the respondent, on April 20, 2005, submitted an application to return to unrelinquished domicile (212(c)[)] on Form I-191. The respondent was seeking 212(c) relief under the Supreme Court's holding in *St. Cyr v. INS* [*sic*] (Citation omitted). That case held that individuals who had pled guilty to offenses that rendered them removable prior to the unavailability of 212(c) relief would still be eligible for that form of relief to date. However, since the respondent's filing of the application for the waiver, the Board of Immigration Appeals issued a precedent decision in the case of *Matter of Blake* (citation omitted) which held that individuals similarly situated to the respondent, that is, individuals charged with removability under 237(a)(2)(A)(iii) of the Act, are ineligible for 212(c) relief in that there is no parallel ground of inadmissibility under the Act for purposes of 212(c) relief. The BIA in that case found that an individual removable under this section of the Immigration and Nationality Act for sexual abuse of a

minor was ineligible for 212(c) relief in removal proceedings.

The respondent in this case has the same situation, and, therefore, I am bound to follow the precedent set by the Board of Immigration Appeals and determine that the respondent is now ineligible to seek 212(c) relief under the Act and under the Supreme Court's holding in *St. Cyr v. INS* [*sic*]. The respondent also having been convicted of a sexual abuse of a minor offense is ineligible for voluntary departure in that that is an aggravated felony. Therefore, the Court has no option but to order the respondent removed to Ireland and ineligible under *Matter of Blake* for the relief of a 212(c) waiver.

The respondent is hereby ordered removed to Ireland on the charges contained in the Notice to Appear.

/s/Jennie L. Giambastiani
JENNIE L. GIAMBASTIANI
Immigration Judge

INA § 212; 8 U.S.C. § 1182

a) Classes of Aliens Ineligible for Visas or Admission.- Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.-

***

(2) Criminal and related grounds.-

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense or an attempt or conspiracy to commit such a crime), or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the

Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely

political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) CONTROLLED SUBSTANCE TRAFFICKERS- Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(D) Prostitution and commercialized vice.-Any alien who-

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10- year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution, is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution.-Any alien-

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 101(h)),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense, is inadmissible.

(F) Waiver authorized.-For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) FOREIGN GOVERNMENT OFFICIALS WHO HAVE COMMITTED PARTICULARLY SEVERE VIOLATIONS OF RELIGIOUS FREEDOM-***

(H) SIGNIFICANT TRAFFICKERS IN PERSONS-
***

(I) MONEY LAUNDERING-

***

(3) Security and related grounds.-

***

(4) Public charge.-

***

(5) Labor certification and qualifications for certain immigrants.-

***

(6) Illegal entrants and immigration violators.-

(A) ALIENS PRESENT WITHOUT admission or parole.-

***

(7) Documentation requirements.-

***

(8) Ineligible for citizenship.-

***

(9) ALIENS PREVISOUSLY Removed.-

***

(10) MISCELLANEOUS.-

***

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

AFFIDAVIT

I, Sharon Ryan, after first being duly sworn upon oath, depose and state as follows:

1. That, I am a United States citizen and resident of the City of Chicago, County of Cook and State of Illinois.

2. That, I am currently 28 years old and I make this affidavit voluntarily.

3. That, I am the biological daughter of Joseph Ryan, the Appellant in this matter.

4. That, on April 22, 1995, my father Joseph Ryan plead guilty to one count of criminal sexual assault and after a plea agreement was sentenced to four years felony probation.

5. That, I was the alleged victim of the sexual assault and the subject upon which the sexual assault case was based.

6. That, on February 18, 2005, instituted proceeding [*sic*] to have the criminal charges dismissed.

7. That, the matter came to be heard at a Post-Conviction hearing on October 21, 2005.

8. That, a decision denying his petition was entered on November 18, 2005.

9. That, prior to the Post-Conviction hearing, I informed my father's counsel, Patrick Brosnan that I was willing and able to testify on my father's behalf at the hearing.

10. That, I informed Mr. Brosnan that if called to testify I would have withdrawn any allegation of wrongdoing by my father against me in the underlying 1995 sexual assault case.

11. That, notwithstanding, my willingness to testify, Mr. Brosnan never called on me to testify at the Post-Conviction hearing.

12. That, if this case were remanded, I would voluntarily and willingly testify on my father's behalf and would withdraw any allegations of prior wrongdoing by him against me.

If called to testify, your affiant can testify completely and fully to the foregoing.

Your affiant further sayeth naught.

/s/ Sharon Ryan

SUBSCRIBED & SWORN to
before me this 4 day
of ~~November~~ 2006
December
/s/ Shamecka D. Marshall
Notary Public

(Notary Seal)